

<b>James v Arverne Houses, Inc.</b>
2007 NY Slip Op 31417(U)
May 16, 2007
Supreme Court, Queens County
Docket Number: 0003588/2005
Judge: Peter Joseph Kelly
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SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PETER J. KELLY  
Justice

IAS PART 16

LAVERNE JAMES AS ADMINISTRATRIX OF  
THE ESTATE OF RAYMOND JAMES,

INDEX NO. 3588/2005

Plaintiff,

MOTION

DATE March 27, 2007

- against -

MOTION

CAL. NO. 13

ARVERNE HOUSES, INC., ARVERNE  
ASSOCIATES, et al,

Defendants.

The following papers numbered 1 to 8 read on this motion by the defendant Schindler Elevator Corporation for summary judgment dismissing the plaintiff's complaint and all cross-claims.

	<u>PAPERS NUMBERED</u>
Notice of Motion/Affid(s)-Exhibits-Memo of Law.....	1 - 5
Affid(s) in Opp.-Exhibits.....	6 - 7
Replying Affidavits.....	8

Upon the foregoing papers the motion is determined as follows:

This action stems from an incident that occurred on December 25, 2004 at a large multiple dwelling located at 146 Beach 49<sup>th</sup> Street in Far Rockaway, New York<sup>1</sup>. The building at issue was one of a group that comprised a complex known as Ocean Village. On the day of the incident, the decedent Raymond James was working at the premises as a security guard. At approximately 8:00 p.m., the decedent was found by other security personnel alone in elevator cab number eight at the premises. The elevator cab was severely damaged by fire that originated in a waste bin which contained Christmas decorations that had purportedly been set on fire by vandals. Apparently, the decedent had dragged the burning waste bin into the elevator in an attempt to extricate it from the premises.

Annexed to the moving and opposition papers were, inter alia, transcripts of the deposition testimony of Derrick Edmonds (the manager

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<sup>1</sup> The premises is referred to alternatively in the moving papers as 57-17 Shore Front Parkway, Arverne, New York.

of the defendant RY Management which was the property management company that ran the day-to-day operations at Ocean Village), Douglas Gross (who testified on behalf of the defendants Arverne Houses, Inc. and Arverne Associates ("Arverne"), the owner of the complex), Laurence Lewandoski (the maintenance manager for Nouveau Elevator Industries, Inc. ("Nouveau")), and Steve Mazza (a field technician for the defendant Schindler Elevator Corporation ("Schindler")).

This testimony established that Schindler, for an undetermined period prior to the incident, was the company responsible for maintaining and inspecting all the elevators at Ocean Village. Two or three days prior to the incident, however, Schindler's services were either terminated, as asserted by Derrick Edmonds, or, "they walked off the job" as alleged by Douglas Gross. Thereafter, Nouveau was contacted to be an interim maintenance company for the elevators at Ocean Village on an "as needed" basis.

In this action, the plaintiff contends, inter alia, that the decedent sustained injuries and death because elevator number eight malfunctioned and trapped the decedent in the elevator car with the burning waste bin.

In a brief and conclusory argument, consisting of precisely six sentences, counsel for Schindler proffers a single specific contention to support this defendant's claim of entitlement to judgment as a matter of law. Specifically, Schindler asserts that since it was terminated as the elevator maintenance company before the incident occurred, no legal duty was owed the plaintiff and, a fortiori, it may not found negligent.

While it is true that "a duty of reasonable care owed by a tortfeasor to an injured party is elemental to any recovery in negligence" (Palka v Servicemaster Management Servs. Corp., 83 NY2d 579, 584), it is clearly apparent the plaintiff contends that, during the period when Schindler was responsible for inspecting and maintaining the elevator cab in question, the identical malfunction that plaintiff alleged caused the decedent to become trapped in the elevator cab existed and that Schindler was negligent in failing to identify and/or remedy this malfunction. Thus, Schindler's argument fails as the termination of the contractual relationship between it and RY Management/Arverne did not vitiate nunc pro tunc Schindler's obligation to have properly fulfilled its inspection and maintenance duties when the contract existed.

However, a second basis to support Schindler's claim for summary judgment may be gleaned from a complete reading of defendant's submission. Although not expressly asserted in defense counsel's argument, annexed to the moving papers and referenced in the factual portion of counsel's affirmation in support of the motion was an accident report generated by the Elevator Division of the New York City Department of Buildings.

The report in question was generated pursuant to section 27-1006 of the New York City Administrative Code and was based upon an inspection of elevator cab number eight performed by John Houlihan on December 27, 2004. Under the section entitled "Accident Description", the report states, in pertinent part:

The elevator cab enclosure, cab door reopening device and cab door operator were made inoperable by the fire and FDNY had to [sic] force open the lobby hoistway doors. The AC lighting for the elevator cab was also disabled by the fire. The motor room control board, main machine, brake, motor and governor appeared in good condition with no apparent visual problem.

Under the portion of the report entitled "Inspection Results", it provided, in pertinent part:

I performed an inspection and found the elevator at the lobby floor with the hall door boarded up with plywood. The plywood was removed by the maintenance Dept and I found the elevator cab to be charred due to extreme heat. The electric had fire damage and the door opener had fire damage. The door interlock was damaged due to the fire departments [sic] forced entry into the inside of the elevator. The rope shackles on top of the car showed no signs of fire damage. The other 10 hall doors and door gibs looked in normal condition. The motor room was in good condition. The drive machine, controller and governor appeared to be in normal condition. The damage was concentrated in the elevator cab and lobby hall door.

In conclusion, the inspector determined that "the elevator damage was caused by a fire coming from a waste bin inside the elevator cab.

The accident report is in evidentiary form as an appropriate certification was affixed thereto (See, CPLR §4520; Kelly v Diesel Constr. Div. of Carl A. Morse, Inc., 35 NY2d 1, 8). Moreover, the conclusions contained therein are admissible as the opinions are based upon post-incident expert analysis of observable physical evidence (Cf., Murray v Donlan, 77 AD2d 337, 347; Hatton v Gassler, 219 AD2d 697) and the agency involved was required to issue a report that included a determination as to the cause of the accident (See, New York City Administrative Code §27-1006).

The report establishes, prima facie, Schindler's entitlement to judgment as a matter of law on the basis that Schindler's actions did not constitute a proximate cause of the elevator malfunction. The inspector determined, based upon a personal inspection of the elevator cab relatively soon after the accident, that the "elevator cab enclosure, cab door reopening device and cab door operator were made inoperable by the fire". The inspector also observed that the "damage was concentrated in the elevator cab and lobby hall door" and that other

operating parts outside the cab such as the motor room control board, main machine, drive machine, brake, motor, governor and rope shackles on top of the car were not damaged. These observations and conclusions demonstrate that the decedent's exit from the elevator cab was impeded as the result of fire damage to the operating mechanism of the elevator cab doors. Accordingly, the plaintiff was required to raise a triable issue of fact as to the causation of the accident.

In opposition, the plaintiff failed to satisfy this burden. The acknowledgment by Steve Mazza, a field technician for Schindler, at his deposition that the elevator doors were frequently damaged by vandals and repaired by Schindler does not sustain the plaintiff's claim that Schindler, by act or omission, negligently repaired or failed to properly repair any damage to the elevator doors. The affidavit of Edwin Godineaux, the decedent's co-worker, submitted by the plaintiff in opposition suffers from the same defect. Although Godineaux avers that at times prior to the incident "the doors to the elevator would not open and had to be pried open" as well as that elevator repair personnel were constantly being notified that the elevator was not operating properly and that they would consistently work on the elevator, there is no proof that any of these repairs were negligently performed or that Schindler failed to repair the elevator in question in a timely manner when requested.

Most importantly, the plaintiff's opposition papers and the deposition testimony did not contain proof that provides a basis for a causal link between any negligence on Schindler's part and the incident. The affidavit of the plaintiff's elevator expert is of no assistance in this regard. The three sentence affidavit of the plaintiff's expert, Patrick McPartland, was, in addition to being factually unsupported, vague and conclusory in every respect (See, Romano v Stanley, 90 NY2d 444; Cicero v Selden Assoc., 295 AD2d 391; Terwilliger v Dawes, 204 AD2d 433).

Accordingly, after considering the evidence in a light most favorable to the plaintiff (See, Kelly v Media Services Corp, 304 AD2d 717; Krohn v Felix Industries, 302 AD2d 499), the motion for summary judgment is granted and the plaintiff's complaint and all cross-claims are dismissed as against the defendant Schindler Elevator Corporation.

Dated: May 16, 2007

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**Peter J. Kelly, J.S.C.**